

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN VANCE,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 241081

Oakland Circuit Court

LC No. 01-181307-FH

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d. Defendant was sentenced to fourteen to twenty-one years' imprisonment as a fourth habitual offender, MCL 769.12. Defendant appeals as of right. We affirm.

Defendant first contends that the victim was inaudible to the jury while testifying at trial. We disagree. Defendant failed to raise this issue below so it is reviewed only for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). The record indicates that defense counsel had a hearing deficiency and the victim was very soft spoken. Consequently, the trial judge went to great lengths to make sure that trial counsel, along with the jury, could hear the victim's testimony. The judge repeatedly asked the victim to raise her voice so that she could be heard. The judge went so far as to sit in the court audience to make sure that the testimony was audible. The record indicates that the judge could hear the testimony from the audience. Further, when necessary, the judge repeated the victim's testimony or had the victim repeat her testimony when defense counsel indicated that he could not hear.

Further, the trial court allowed the jury to listen to a recording of the victim's testimony during deliberations. This recording was used to create the trial transcript in this case. We note that the transcript does not designate any portion of the victim's testimony as being inaudible. In sum, the record simply does not support defendant's claim that the jury was unable to hear the victim's testimony. There exists absolutely no record evidence to support defendant's claim.¹

¹ Moreover, this Court has long held that partially inaudible tape recordings will be admitted as long as the inaudible portions of the recordings do not amount to such a substantial portion of the (continued...)

Defendant next argues that the judge's repeating of the victim's testimony pierced the veil of judicial impartiality. We disagree. Given that defendant did not object below, this issue is reviewed for plain error affecting substantial rights. *Hawkins, supra* at 447. A trial court has wide discretion and power in the matter of trial conduct. We review the record as a whole and do not take portions out of context in order to show trial court bias against defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The repeating of the testimony did not pierce the veil of judicial impartiality.² This Court articulated the test for determining if a judge's questions and comments amount to intimidation and prejudice in *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), stating: "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Id.* The trial court's repeating of the victim's testimony did not show partiality. The judge did not reword or make statements about any of the testimony. She only repeated the statements so that the jury and counsel could hear the victim's testimony. The judge's repetition of the testimony is insufficient to have influenced the jury to the detriment of the defendant's case. *Cheeks, supra* at 470.

Further, the trial court's instructions to the jury cured any error. The jury was instructed that the judge's comments were not evidence and were not meant to influence the jury in any way. The jury was also instructed that, if it believed the trial court had an opinion about the case, it must disregard that opinion and decide the case only on the evidence. These instructions cured any possible detriment to defendant. *People v Gratton*, 107 Mich App 478, 482; 309 NW2d 609 (1981).

Defendant next raises two claims of prosecutorial misconduct. Claims of prosecutor misconduct are reviewed de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; ___ NW2d ___ (2003).

First, defendant claims that the prosecutor committed misconduct by arguing facts not in evidence during closing argument. Defendant is correct that the prosecutor did make factual assertions not supported by the record evidence. However, defendant objected to this statement and the court sustained this objection. Further, the lower court carefully instructed the jury that the lawyers' arguments were not evidence. This careful and explicit instruction, which followed the trial court's action of sustaining defendant's objection to the unsupported factual statement

(...continued)

testimony that the jury must speculate as to what was said. *People v Frison*, 25 Mich App 146, 148; 181 NW2d 75 (1970). Here, the trial court repeatedly regulated the volume of the victim's testimony and repeated or had the victim repeat any testimony that was too quiet to hear. This is clearly more than what is required of an audio recording where any inaudible sections are merely left blank.

² We note that it was for defense counsel's benefit that the judge repeated the victim's testimony. Moreover, defense counsel also repeated some of the victim's testimony. This affirmative approval of the repeating of the victim's testimony may constitute a waiver that extinguishes any claim of error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

argued during closing by the prosecutor, cured any potential prejudice to defendant. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Second, defendant argues that the prosecutor committed misconduct by arguing during her closing that defendant brought forth no evidence regarding what time he arrived home the night of the assault.³ Because defendant did not preserve this issue, it is reviewed for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). No reversible error exists where a curative instruction could have alleviated any possible prejudicial. *Ackerman*, *supra* at 449. Here, the trial court carefully instructed the jury that the lawyers' arguments were not evidence, that defendant was not required to offer evidence, and that the prosecution had the burden to prove every element of the crime beyond a reasonable doubt. These instructions were sufficient to cure any prejudice to defendant. *Green*, *supra* at 693.

Defendant's argument also implies that the prosecutor's statements were an improper comment on his decision not to testify. We disagree. A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment about the defendant's failure to testify if someone other than defendant could have offered contradictory testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), *aff'd* 460 Mich 55 (1999). Here, defendant lived with his mother, who could have offered testimony regarding when defendant arrived home that night. Thus, the prosecutor's comments did not improperly refer to defendant's decision not to testify. *Id.*

Defendant also raises two ineffective assistance of counsel claims. Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Defendant did not move for a *Ginther*⁴ hearing, nor did he move for a new trial based on ineffective assistance of counsel. Thus, review is limited to mistakes apparent in the record. *People v McCurdy*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

Defendant predicates the first ineffective assistance claim on his counsel's failure to ask for a specific curative instruction following his sustained objection to the prosecutor's argument of facts not supported by the record. As explained above, the court offered sufficient instruction to the jury to cure any prejudice to defendant. Given that the court already offered sufficient instructions, a request for a specific instruction would have been cumulative and frivolous. It is not ineffective assistance of counsel to refuse to make meritless motions or frivolous requests. *People v Dardin*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

³ Where prosecutorial misconduct is alleged to arise from an argument advanced during the prosecutor's closing, this Court must examine the entire record and evaluate the claim of error in the context of all the proofs and arguments advanced during trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Here, the prosecutor advanced this argument to rebut a theory implied by defendant that he had insufficient time to commit the crime. Once a defendant raises an issue, the door is open to full and complete development of that issue. *Id.* at 103.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also claims that trial counsel was ineffective because he failed to object to the prosecutor's statement that no evidence was offered to show when defendant arrived home. As explained above, this did not prejudice defendant. The prosecution's statements were a legitimate response to a defense theory, namely that there was insufficient time for defendant to have committed the assault. Thus, an objection to this relevant argument would have been futile. It is not ineffective assistance of counsel to refuse to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).⁵

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood

⁵ Defendant also argues that the trial court erred in not allowing him to present evidence of the victim's potential mental instability. This issue was not raised or implied in defendant's statements of questions presented on appeal. As such, the issue is not properly presented to this Court, and we will decline to address it. *People v Knox*, 256 Mich App 175, 203; 662 NW2d 482 (2003).